88-731

No. 88-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND; THOMAS L. FAGAN; W.F. HARDY (Deceased); JAMES H. HUTCHINSON, JR.; SAMUEL A. MONTANI (Deceased); CHARLES E. SALVATORE; JOSEPH E. ZAUCHA; RICHARD R. PELUSO; AND RAYMOND H. BAKER,

Petitioners,

—v.—

CARL COLTERYAHN DAIRY, INC.; PENSION BENEFIT GUARANTY CORPORATION; AMERICAN BENEFIT CORPORATION; MELVIN M. BROOKS, C.P.A.; FRANK STOKES, Individually and as Agent of AMERICAN BENEFIT CORPORATION; and LEON B. WILNEFF, Individually and as Agent of AMERICAN BENEFIT CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Of Counsel:

Henry M. Wick, Jr.
Charles J. Streiff
Vincent P. Szeligo
WICK, STREIFF, MEYER, METZ & O'BOYLE
1450 Two Chatham Center
Pittsburgh, PA 15219
(412) 765-1600

James B. Weidner
(Counsel of Record)
Stanley Godofsky
R. Scott Henderson
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000
Attorneys for Petitioners Western Pennsylvania Teamsters and Employers Pension Fund, et al.

QUESTION PRESENTED

Where Congress by statute specified the remedies available to parties allegedly wronged under multiemployer pension plans, did the court below err in creating additional, new federal common law causes of action for employers supposedly defrauded by such plans, reasoning that it would be "quite curious" for Congress to have omitted such claims from its comprehensive statutory scheme?

PARTIES TO THE PROCEEDING

In addition to the petitioners listed in the caption (appellees/cross-appellants in the proceeding below), the following were appellees in the proceeding below: American Benefit Corporation; Melvin M. Brooks, C.P.A.; Frank Stokes, Individually and as Agent of American Benefit Corporation; and Leon B. Wilneff, Individually and as Agent of American Benefit Corporation. Pension Benefit Guaranty Corporation was intervenor in the proceeding below. The respondent listed in the caption was the appellant/cross-appellee in the proceeding below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. _____

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND; THOMAS L. FAGAN; W.F. HARDY (Deceased); JAMES H. HUTCHINSON, JR.; SAMUEL A. MONTANI (Deceased); CHARLES E. SALVATORE; JOSEPH E. ZAUCHA; RICHARD R. PELUSO; AND RAYMOND H. BAKER,

Petitioners,

—v.—

CARL COLTERYAHN DAIRY, INC.; PENSION BENEFIT GUARANTY CORPORATION; AMERICAN BENEFIT CORPORATION; MELVIN M. BROOKS, C.P.A.; FRANK STOKES, Individually and as Agent of AMERICAN BENEFIT CORPORATION; and LEON B. WILNEFF, Individually and as Agent of AMERICAN BENEFIT CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Western Pennsylvania Teamsters and Employers Pension Fund, Thomas L. Fagan, W. F. Hardy (deceased), James H. Hutchinson, Jr., Samuel A. Montani (deceased), Charles E. Salvatore, Joseph E. Zaucha, Richard R. Peluso and Raymond H. Baker (collectively "the Fund"), respectfully request that a Writ of Certiorari issue to review the opinion and

judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 31, 1988.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Western District of Pennsylvania dismissing the complaint is unreported (25a)[1]. That court's subsequent memorandum opinion on reconsideration is also unreported (32a). The opinion of the United States Court of Appeals for the Third Circuit reversing the orders of the district court is reported at 847 F.2d 113 (1988) (1a).

JURISDICTION

The Court of Appeals for the Third Circuit rendered its opinion on May 31, 1988. With leave of the court of appeals, on July 8, 1988, the Pension Benefit Guaranty Corporation filed a petition for rehearing *en banc*, which was denied on July 25, 1988. On August 19, 1988, this Court, per order of Brennan, J., extended the time of petitioners to file a petition for a writ of certiorari to October 28, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves certain provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1453 (36a), which amended and expanded the statutory scheme created by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, in order to enhance and maintain the financial integrity of multiemployer pension benefit plans. Of particular significance is Section 1451 (52a), which expressly provides a right of action to

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1 Citations herein to the material printed in the Appendices appear as "____a."

an "employer . . . who is adversely affected by the act or omission of any party" under the provisions of the MPPAA.

STATEMENT OF THE CASE

At issue is the first decision to permit employers that withdraw from pension benefit plans to sue pension funds and their trustees under a judicially-created federal common law cause of action for fraud—never before articulated—and to litigate those claims without first arbitrating the withdrawal liability dispute.

A. Statutory Background

Employers that participate in an ERISA benefit plan make contributions on behalf of their employees as required by the terms of a collective bargaining agreement with the employees' union. Each plan is administered by trustees—chosen by the employers and the union in equal number—who determine the level of benefits to be paid to plan participants.

Congress enacted the MPPAA in 1980 to discourage employers from withdrawing from multiemployer pension benefit plans. *See Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 108 S. Ct. 830, 834 (1988). Before 1980, contributing employers that withdrew from such plans were made responsible for a share of the plan's liabilities only if the plan terminated within five years of the employers' withdrawal. Under the 1980 amendments, however, liability is assessed against all withdrawing employers, regardless of the date of a plan's subsequent termination. When an employer withdraws from a pension benefit plan, the plan trustees are required to determine the amount of its withdrawal liability by reference to specified criteria. *See* 29 U.S.C. §§ 1381-1399. In essence, the withdrawing employer must pay an amount sufficient to cover its allocable share of the plan's unfunded vested benefits. 29 U.S.C. §§ 1381(b), 1391(b).

The 1980 amendments provided a comprehensive scheme for resolving withdrawal liability disputes between employers and

plans. The statute provides that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 . . . shall be resolved through arbitration," and only thereafter may a "party thereto . . . bring an action . . . to enforce, vacate or modify the arbitrator's award." 29 U.S.C. §§ 1401(a)(1), (b)(2). Such actions are brought pursuant to section 1451, which provides that "[a] plan fiduciary, employer, plan participant or beneficiary, who is adversely affected by an act or omission of any party under [the MPPAA] with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both." 29 U.S.C. § 1451(a)(1).

B. History of the Case

During the early 1970's, respondent Carl Colteryahn Dairy, Inc., ("Employer") was a contributing employer to the Greater Pittsburgh Dairy Industry Pension Fund ("Dairy Fund"). In 1976, an agreement was reached for the merger of the Dairy Fund and the Western Pennsylvania Teamsters Fund ("the Fund"), and the Employer became a contributing employer to the Fund sometime thereafter.[2] In 1984, as a result of a labor dispute, the Employer ceased making contributions to the Fund and withdrew from it. Pursuant to the MPPAA, the Fund assessed the Employers' withdrawal liability in the amount of $589,239 and issued a notice and demand for payment in that amount on March 14, 1985. The Employer objected and challenged the assessment pursuant to the Fund's review process. Ultimately, the Fund trustees affirmed the withdrawal liability assessment and, on December 4, 1985, the Employer initiated arbitration of the dispute. *See* 29 U.S.C. § 1401(a)(1).

Before the arbitration was completed, however, the Employer filed this suit for damages and declaratory and

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2 The record before the court of appeals did not include the actual date of the "consummation" of the merger. *See* 13-14a, n. 11. The complaint alleged that the Articles of Merger were executed "in or about December 1976," but that "[t]he actual consummation of said Merger occurred at sometime between December 1975 and April 1984." (¶ 13).

injunctive relief in the United States District Court for the Western District of Pennsylvania, alleging that the Fund had incorrectly calculated the amount of withdrawal liability. The suit further alleged that the assessment of withdrawal liability was entirely the result of the Fund's fraudulent concealment of its pre-merger unfunded liabilities which induced the Employer to join the pension plan. The district court, on March 11, 1987, dismissed the Employer's complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. The district court held that under the MPPAA, the Employer was required to complete arbitration of its withdrawal liability dispute before it could litigate its claims. The Employer appealed the dismissal to the United States Court of Appeals for the Third Circuit.

C. The Decision Below

The court of appeals agreed with the district court that the Employer's erroneous calculation claim should have been arbitrated as an initial matter,[3] but reversed the district court's dismissal of the fraud claims. It held that, unlike the erroneous calculation claim, the statute did not require initial arbitration of this aspect of the dispute. 10a. The court further held that the district court had subject matter jurisdiction over fraud claims pursuant to section 1451 because the fraud claims, in the court's view, clearly concerned "acts or omissions" under the MPPAA. 12a.

The court of appeals found two substantive bases for the Employer's fraud-related claims. It noted that if the Fund's alleged "acts or omissions" occurred after the effective date of the MPPAA, they may have violated section 1411, which provides certain pre-merger valuation and reporting requirements. 13-14a & n. 11. Because of its uncertainty as to whether the

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3 Rather than affirming the district court's dismissal of that count, however, the court of appeals remanded with directions to stay its litigation pending the completion of arbitration. 20a. Shortly thereafter, on June 13, 1988, the Arbitrator issued his final Decision and Award. *Carl Colteryahn Dairy, Inc.* v. *Western Pa. Teamsters and Employers Pension Fund*, AAA Case No. 55-621-0018-85 MEPP (1988).

alleged "acts or omissions" occurred after the effective date of the MPPAA, however, the court ultimately declined to rule on the viability of the Employer's statutory-based claim. *Id.* Instead, in a decision it described as one of "first impression," (4a), the court *created* an action for the fraudulent assessment of withdrawal liability under the "federal common law of pension plans." 17a. The court "doubt[ed]" that Congress had intended by MPPAA to prelude such a claim and reasoned that it would be "quite curious" for Congress to have done so. 15a. It is the court's creation of this heretofore unknown federal common law claim that is the principal subject of this Petition for Certiorari.

After the court of appeals filed its opinion, the Pension Benefit Guaranty Corporation ("PBGC"), with leave of the court, filed a Petition for Rehearing and a Suggestion for Rehearing *En Banc*. In its petition, the PBGC contended that the court of appeals' decision "creates a new remedy that not only upsets, but impermissibly supersedes the statutory enforcement scheme" and could "substantially undermine the integrity of the [MPPAA] and the financial soundness of multiemployer pension plans." Petition for Rehearing at 13, 4. The court of appeals denied the PBGC's petition on July 25, 1988. 23a.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES IMPORTANT QUESTIONS OF LAW THAT HAVE NOT BEEN BUT SHOULD BE RESOLVED BY THIS COURT

The issue presented is of great practical significance to thousands of pension plans and millions of their beneficiaries throughout the country.

The decision below permits employers to sue such plans under previously undefined and potentially open-ended federal common law causes of action. It thus threatens to undermine the comprehensive enforcement scheme enacted by Congress to protect the financial integrity of employee benefit plans. Instead of ensuring certainty for multiemployer pension plans,

as Congress intended MPPAA would do, the decision below again engenders uncertainty. And, by disregarding the congressional mandate that disputes concerning withdrawal liability are first to be arbitrated, the court has permitted employers to bypass the statute's economical and efficient mechanism for resolution of such disputes.

The court's decision squarely conflicts with the admonitions of this Court limiting judicial creation of extra-statutory claims; the decision warrants review.

1. *The Decision Below Improperly Supersedes Statutory Remedies.* The MPPAA's enforcement section provides that an "employer . . . who is adversely affected by the act or omission of any party under [the sections of MPPAA] with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both." 29 U.S.C. § 1451(a)(1). As the court of appeals confirmed, the Employer's contention that the Fund had fraudulently induced a merger to the Employer's detriment does indeed implicate one of the enumerated provisions. That provision is section 1411 of MPPAA, which provides that multiemployer plans may not merge absent actuarial valuation of each of the plans. *See* 13a.

The court, however, was not satisfied the statutory remedy would be sufficient to provide the relief the Employer here seeks, given the timing of the particular merger involved. 13-14a & n. 11. The court "refuse[d] to impute to Congress . . . an intent to deny" respondent a remedy in these circumstances (12a, n. 9.), reasoning that the absence of such relief would be "quite curious." 15a. Instead, based on generalized notions of equity, the court below fashioned an open-ended, non-statutory cause of action for fraud—a cause of action that Congress omitted from its comprehensive ERISA/MPPAA legislation. The decision below thereby contravenes the directives of this Court.

The Court repeatedly has stated that the judiciary is not to infer a cause of action from a statute unless the statutory language or legislative history clearly demonstrates Congress'

intent to create such a claim. "In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute." *Thompson* v. *Thompson*, 108 S. Ct. 513, 516 (1988). Courts are "not [to] engraft a remedy on a statute, no matter how salutory, that Congress did not intend to provide." *California* v. *Sierra Club*, 451 U.S. 287, 297 (1981).

There is no doubt as to Congress' "intent" in enacting the MPPAA. Congress was concerned that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations." 29 U.S.C. § 1001a(a)(4)(A). Congress' purpose was to protect plans as well as their beneficiaries, not to increase the legal leverage of withdrawing employers. Congress thus statutorily prescribed the liabilities to be assessed withdrawing employers *and* equally circumscribed what remedies would be available to those employers. "[A]dversely affected" employers—including withdrawing employers—could sue for "the act or omission of any party" only under the provisions of MPPAA. 29 U.S.C. § 1451(a)(1).

The statute itself thereby reflects the balance Congress struck between the interests of withdrawing employers and the beneficiaries of continuing pension plans. The legislative history of MPPAA contains no indication whatsoever that Congress intended to permit courts to construct, as did the court below, any claim for employers beyond that which Congress itself created.

As the Court has explained, the judiciary should be extremely reluctant to find an implied cause of action when Congress has provided a comprehensive stautory scheme, but omitted the cause of action sought to be inferred. As in the other enforcement provisions of ERISA, the MPPAA "set[s] forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest," *see Pilot Life*

Ins. Co. v. *Dedeaux*, 107 S. Ct. 1549, 1556 (1987)—here, the interest in fostering the economic stability of employee benefit plans. "The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." *Id.* at 1556-1557.

If, as the court of appeals suggested, the statutory remedy does not encompass all of the Employer's claims, *see* 13-14a, n.11, this still would not justify the court's intervention, for "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981). The MPPAA constitutes just such a "comprehensive legislative scheme," and the court of appeals' decision to supersede its provisions was squarely at odds with this Court's expressed "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985).

The court below justified its decision on vague "equitable" grounds, "doubt[ing]" the notion that Congress intended to leave defrauded employers without a remedy. 15a. But, as the Court has put it, "a favorable reaction to the equitable considerations supporting [a non-statutory claim] is not a sufficient reason for enlarging on the remedial provisions contained in . . . carefully considered statutes." *Northwest Airlines*, 451 U.S. at 98 (footnote omitted).

Nor was the court below correct in grounding its decision upon notions of "federal common law." This Court has instructed that "federal courts . . . are courts of limited jurisdiction that have not been vested with open-ended law-making powers." *Id.* at 95. The judiciary has authority to create federal common law only in areas of " 'uniquely federal interests' " or where "Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law." *Texas*

Indus., Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981). And, even where the statute involved is one that Congress envisioned the courts would supplement through the decisional process, courts are not free to fashion such remedies as may seem appropriate in their equitable discretion. As the Court said in rejecting an attempt to construct a remedy of contribution under the Sherman Act, a statute which Congress expected the courts to shape, "[t]here is nothing in the statute itself, in its legislative history, or in the overall regulatory scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted." *Texas Indus.*, 451 U.S. at 645.

So, too, here. Whether or not Congress intended when enacting ERISA in 1974 to permit a judicial gloss upon it, nothing suggests that Congress meant courts to infer, let alone create, remedies for employers beyond those which Congress itself specifically enacted in 1980 through the MPPAA. Review of the decision below is plainly warranted.

2. *The Decision Below Is Contrary To Congressional Purpose.* To the extent courts are authorized at all to develop a "federal common law of pension plans," they must do so consistently with the overarching statutory scheme and purpose. *Cf. Texas Indus.*, 451 U.S. at 643. Congress' purpose in enacting MPPAA was to increase the stability of multiemployer pension plans by severely reducing the ability of withdrawing employers to cause fiscal uncertainty to those plans. The court of appeals' creation of undefined common law claims that employers can use to avoid withdrawal liability thus was particularly inappropriate. Congress was well aware that litigation with employers

> detract[s] from the ability of plans to formulate or meet funding standards and adversely affect[s] the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected

delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.[4]

Accordingly, the enforcement scheme enacted by Congress restricts claims under section 1451 only to acts or omissions that violate enumerated statutory provisions. By contrast, claims arising under the "federal common law of pension plans" would be unlimited, except by the imagination of plaintiffs' counsel. A Congress that enacted comprehensive amendments "to protect the interests of participants and beneficiaries of distressed multiemployer plans and . . . to ensure benefit security to plan participants" could not possibly have intended such a result. *See* H.R. Rep. No. 869, 96th Cong., 2d Sess. 71 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2939. Certainly, Congress did not expect the courts to create common law claims that undermine the very policy—ensuring certainty in pension plans—that the statute was intended to foster. Yet, the decision below contravenes that congressional policy, just as it does the admonitions of the Court.

Absent review by the Court now, the decision below will almost certainly impel additional litigation as employers increasingly seek to assert vague federal common law claims in efforts to avoid withdrawal liabilities to multiemployer pension plans. The certainty and financial stability Congress thought it was providing for those plans by the MPPAA will continue to erode—to the detriment of the plans and their beneficiaries. For this reason too, review is warranted.

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4 Comm. on Labor and Human Resources, 96th Cong., 2d Sess., The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 43-44 (Comm. Print 1980). Although these comments were made with respect to a MPPAA provision concerning delinquent contributions, "[t]hese same principles apply to a plan's claims for employer withdrawal liability assessed in accordance with this legislat[ion]." 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (remarks of Representative Thompson). *See* 29 U.S.C. § 1451(b).

3. *The Decision Below Permits Employers To Bypass Mandatory Arbitration.* The Court below compounded its misreading of the statutory scheme and purpose by refusing to stay litigation of the Employer's fraud claims until arbitration was completed. *See* 10a. The MPPAA's mandatory arbitration regime is intended to protect pension plans from "dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan." Comm. on Labor and Human Resources, 96th Cong., 2d Sess., The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 20 (Comm. Print 1980); *see* 29 U.S.C. §§ 1401(a)(1). By providing a mechanism for the prompt and efficient resolution of withdrawal liability disputes, the MPPAA prevents the dimunition of plan assets through unnecessary litigation and preserves those assets for the plan's beneficiaries. The congressional mandate is clear: " 'arbitration first'." *E.g. Grand Union Co.* v. *Food Employers Labor Relations Ass'n*, 808 F.2d 66, 71 (D.C. Cir. 1987).

The withdrawal liability assessed by the Fund comprises the only damages alleged in the Employer's complaint. Read literally, the Employer's fraud claims thus constitute a "dispute . . . concerning a determination" made under the MPPAA's withdrawal liability provisions. *See* 29 U.S.C. § 1401(a)(1). Even if not arbitrable, however, claims of this sort should not be litigated until an arbitrator determines the correct amount of the withdrawal liability assessment—a matter clearly within his statutory authority. An arbitrator's resolution of the erroneous calculation issue could completely dispose of an employer's fraud claims by reducing the alleged damages—that is, the amount of assessed withdrawal liability—to zero. At the very least, his decision would develop a "factual matrix" to aid the district court, *Jos. Schiltz Brewing Co.* v. *Pension Benefit Guar. Corp.*, 5 EBC 2561, 2564 (E.D. Wis. 1984), and put a ceiling on the damages recoverable under the fraud theory.

Consistent with the statute's language and purpose, requiring a stay of related litigation until arbitration is complete would eliminate duplicative and possibly irrelevant proceedings. Although arbitration of the erroneous calculation claim in this

case has now been completed, this element of the court of appeals' decision stands as an invitation for other employers to avoid the arbitration required by Congress and underscores the need for review of the court's overall rationale.

CONCLUSION

The decision below raises fundamental issues of federal law concerning judicial creation of non-statutory remedies. It also has important practical significance for pension plans throughout the United States. By fashioning a claim outside the remedies Congress specified by statute, the court of appeals shifted the balance Congress set between multiemployer plans and withdrawing employers. The decision also undermines the comprehensive enforcement scheme enacted by Congress to preserve the financial integrity of these plans and the pension benefits of millions of workers and retirees. Petitioners request that a writ of certiorari issue to review the court of appeals' decision.

Dated: October 26, 1988

Respectfully submitted,

James B. Weidner
(*Counsel of Record*)
Stanley Godofsky
R. Scott Henderson
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000

Attorneys for Petitioners Western Pennsylvania Teamsters and Employers Pension Fund, et al.

Of Counsel:

Henry M. Wick, Jr.
Charles J. Streiff
Vincent P. Szeligo
WICK, STREIFF, MEYER, METZ & O'BOYLE
1450 Two Chatham Center
Pittsburgh, PA 15219
(412) 765-1600

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 87-3262 & 87-3295

CARL COLTERYAHN DAIRY, INC.,

Appellant/Cross Appellee

—v.—

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND, AMERICAN BENEFIT CORPORATION, MELVIN M. BROOKS, C.P.A., FRANK STOKES, individually and as agent of AMERICAN BENEFIT CORPORATION, LEON B. WILNEFF, individually and as agent of AMERICAN BENEFIT CORPORATION, THOMAS L. FAGAN, W.F. HARDY, JAMES H. HUTCHINSON, JR., SAMUEL A. MONTANI, CHARLES E. SALVATORE, JOSEPH E. ZAUCHA, RICHARD R. PELUSO, RAYMOND H. BAKER, individually and as Trustees of the WESTERN PENNSYLVANIA TEAMSTERS EMPLOYERS PENSION FUND,

Appellees

The Western Pennsylvania Teamsters and Employers Pension Fund and its individually named Trustees, Thomas L. Fagan, W. F. Hardy, James H. Hutchinson, Jr., Samuel A. Montani, Charles E. Salvatore, Joseph E. Zaucha, Richard R. Peluso, and Raymond H. Baker,

Appellees/Cross Appellants

On Appeal from the United States District
Court for the Western District
of Pennsylvania
(D.C. Civil No. 86-2428)

Argued November 3, 1987

Before: SLOVITER, BECKER and COWEN*
Circuit Judges

(Filed May 31, 1988)

RICHARD B. SANDOW (Argued)
Jones, Gregg, Creehan and Gerace
16th Floor, Grant Building
Pittsburgh, PA 15219

Attorney for Appellant/Cross-Appellee

HENRY M. WICK, JR.
CHARLES J. STREIFF (Argued)
VINCENT P. SZELIGO
Wick, Streiff, Meyer, Metz & O'Boyle
1450 Two Chatham Center
Pittsburgh, PA 15219

DAVID M. NEUHART
Dickie, McCamey and Chilcote, P.C.
Two PPG Place, Suite 400
Pittsburgh, PA 15222-5402

* At the time this case was argued, Judge Cowen was a United States District Judge for the District of New Jersey sitting by designation. On November 16, 1987 he entered on duty as a United States Circuit Judge for the Third Circuit.

DAVID L. BECK
Weis and Weis
1121 Penn Avenue
Pittsburgh, PA 15222-4205

Attorneys for Appellees/Cross Appellants

OPINION OF THE COURT

BECKER, *Circuit Judge.*

Plaintiff Carl Colteryahn Dairy, Inc. ("Colteryahn") withdrew as a contributing employer to the Western Pennsylvania Teamsters and Employers Pension Fund ("Western Pennsylvania Fund" or "Fund"), a multiemployer pension plan, whereupon the Fund imposed a withdrawal liability assessment under the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. §§ 1381-1453 (1982). Colteryahn challenged the assessment by suing the Fund, its trustees, and its accountants and actuaries in the district court for the Western District of Pennsylvania, alleging that: (1) the defendants had fraudulently induced Colteryahn to accede to a merger of the Fund with another plan to which Colteryahn belonged through a series of misrepresentations and concealments that violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1982), and directly led to the improper assessment; (2) the Fund had improperly calculated the assessment because of an erroneous interpretation of 29 U.S.C. § 1391 (methods for computing withdrawal liability); and (3) the defendants had breached certain state common law contract and tort duties. On motion of the Fund, the district court dismissed the complaint for lack of subject matter jurisdiction, holding that the federal claims must first proceed to MPPAA arbitration and that the court thus lacked pendent jurisdiction over the state law claims. Colteryahn appealed, and the Fund and its trustees cross-appealed.

Colteryahn contends that its fraud claim is not cognizable by a MPPAA arbitrator because the claim does not fall within the

specific statutory provisions reserved for arbitral resolution, and that its improper calculation claim is a pure statutory interpretation question for which arbitration is unnecessary. The Fund rejoins that the fraud claim is really a claim for breach of fiduciary duty under 29 U.S.C. § 1132 which Colteryahn has no standing to bring, and that the improper calculation claim falls squarely within the statutory provisions expressly reserved for arbitration. On its cross-appeal, the Fund contends that the district court should have declared the state law claims preempted by ERISA, rather than dismissing them for lack of jurisdiction.

We will reverse the district court's dismissal of the fraud, misrepresentation and concealment counts for several reasons. First, we conclude that this is not the type of technical calculation issue that Congress explicitly reserved for MPPAA arbitration. Second, we determine that the district court had subject matter jurisdiction over these claims under 29 U.S.C. § 1451. Third, we find that Colteryahn has alleged a violation of either MPPAA's merger regulations, 29 U.S.C. § 1411, or the federal common law of pension plans. Determining a question of first impression, we hold that under this federal common law, which we are authorized by ERISA to develop, a defrauded employer has a cause of action for the return of any sums that were fraudulently assessed by a pension plan.

We will affirm the district court's order insofar as it refused to decide the improper calculation claim, because we agree that Colteryahn must first submit this claim to arbitration under 29 U.S.C. § 1401; however we will remand so that the court can stay, rather than dismiss, the action. Finally, on the cross-appeal, given our holding that a federal question remains within the district court's jurisdiction, we will reverse the district court's dismissal of the state law claims and remand for a determination of whether those claims are preempted by ERISA.

I. STATUTORY BACKGROUND

The Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1453, was Congress' response to the growing problem of financial insolvencies of multiemployer pension plans. The problem was caused in large part by the ease with

which employers could withdraw from such plans, often leaving those plans starving for funds. *See* H.R. Rep. No. 869, 96th Cong., 2d Sess. 54-55, 60, 67, 73, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918.[1] Congress intended MPPAA to discourage such withdrawals and thus ensure the solvency of such plans. *See United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan* v. *Yahn & McDonnell, Inc.*, 787 F.2d 128, 130 (3d Cir. 1986), *aff'd by an equally divided Court sub nom. Pension Benefit Guar. Corp.* v. *Yahn & McDonnell, Inc.*, 107 S. Ct. 2171 (1987). The heart of the Act is its requirement that withdrawing employers pay a substantial withdrawal liability sum to the pension plan, a sum to be calculated without regard either to the net worth of the withdrawing employer or to the continued viability of the plan itself.[2]

At bottom, an employer's withdrawal liability is essentially equal to the employer's allocable share of the plan's unfunded vested benefits, subject to certain adjustments, *see* 29 U.S.C.

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1 *See also Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 108 S. Ct. 830, 834 (1988) ("In its 1980 amendments to ERISA, Congress . . . was primarily concerned about the burden placed upon the remaining contributors to a multiemployer fund when one or more of them withdraw. In response to this concern Congress enacted an elaborate provision imposing 'withdrawal liability' on such withdrawing employers.") (footnotes omitted).

2 In a more extended discussion of the history and requirements of MPPAA, we explained that

> [p]rior to MPPAA, 29 U.S.C. § 1381 *et seq.* (1982), an employer who withdrew from a pension plan incurred a contingent liability: if a multiemployer plan terminated within five years following an employer's withdrawal, the employer was liable to the [Pension Benefit Guaranty Corp.], but if the plan did not terminate within five years, the employer had no liability. The maximum of each employer's liability was 30% of its net worth. Because an employer who withdrew from a plan more than five years prior to its termination escaped with no liability, the remaining employers bore a greater share of liability. There was thus an incentive for employers to withdraw from plans in order to avoid future liability. Many withdrawals resulted, and the solvency of pension plans was threatened.

Yahn & McDonnell, 787 F.2d at 130. For another overview of MPPAA, *see Flying Tiger Line* v. *Teamsters Pension Trust Fund*, 830 F.2d 1241, 1243-44 (3d Cir. 1987).

§ 1381(b) (1982). An employer's allocable share of these benefits is based primarily on the employer's proportionate share of contributions made to the Fund. *See, e.g.*, 29 U.S.C. § 1391(b) (1982 & Supp. III 1985). The Act provides a series of complex formulas by which a withdrawal liability sum is to be calculated. *See* § 1391.[3] Given the complexity of the calculations and the many technical issues that must be addressed to assess a bottom line liability, *see* 29 U.S.C. §§ 1381-1399, Congress has created a system of arbitration designed to resolve most disputes over such determinations. *See* 29 U.S.C. § 1401 (1982). Those disputes that "concern[ ] a determination made under sections 1381 through 1399 of [title 29]" may ultimately be heard in court upon review of an arbitration proceeding, 29 U.S.C. § 1401(a)(1);[4] however MPPAA's primary mandate for these disputes is plain: *arbitrate first*. § 1401(a)(1); *Flying Tiger Line* v. *Teamsters Pension Trust Fund*, 830 F.2d 1241, 1248-49 (3d Cir. 1987).

The pages of the Federal Reporter are replete with challenges to this mandate, as litigants have attempted to bypass arbitration in favor of the federal courts and the courts have struggled to develop rules to determine when a MPPAA dispute must first go to arbitration. *See, e.g., Flying Tiger; Dorn's Transp.* v. *Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986); *Republic Indus.* v. *Central Pa. Teamsters Pension Fund*, 693 F.2d 290 (3d Cir. 1982); *Grand Union Co.* v. *Food Employers Labor Relations Ass'n*, 808 F.2d 66 (D.C. Cir. 1987). This dis-

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3 For a practical explanation of how withdrawal liabilities are calculated, including an explanation of the allocation formulas, see Schmidt, *MPPAA Withdrawal Liability: Calculation, Methodology, Statutory Limitations, and Exceptions, and Accounting Treatment*, in Practising Law Institute, ERISA: The Multiemployer Pension Plan Amendments Act of 1980, 33-61 (B. Obrentz & A. Woodard, Cochairmen 1984).

4 Section 1401 (b)(2) provides for an action "to enforce, vacate, or modify the arbitrator's award"; however in any such proceeding "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c). *See generally Yann & McDonnell*, 787 F.2d at 135-44 (declaring unconstitutional the statutory presumption of correctness granted by arbitrator to Fund's determination of withdrawal liability, but retaining presumption of arbitral correctness upon judicial review).

pute presents another such challenge. *See infra* Parts III.A., IV. However, because we conclude that part of Colteryahn's claim, which alleges fraud and misrepresentation, need not first be submitted to arbitration, we must also consider the basis for federal jurisdiction over that claim, *see infra* Part III.B., and the substantive basis, if any, for a federal cause of action, *see infra* Part III.C.

II. FACTS AND PROCEDURAL HISTORY

The district court dismissed this case pursuant to Fed. R. Civ. P. 12(b)(1) before defendants even filed an answer, and thus no factual record has been developed. The following facts, therefore, are culled primarily from plaintiff's complaint, all of which we must assume to be true for purposes of this appeal. *See Saporito* v. *Combustion Engineering, Inc.*, No. 87-5144, slip op. at 5 (3d Cir. March 29, 1988).

Prior to 1976, Colteryahn was a member of the Greater Pittsburgh Dairy Industry Pension Fund ("Dairy Fund"). After extended negotiations in 1975 and 1976 between the Dairy Fund and the Western Pennsylvania Fund, the Dairy Fund agreed to merge into the Western Pennsylvania Fund. A merger agreement was executed in December, 1976. However, the date of the actual consummation of the merger is unclear, occurring sometime between December, 1975 and April, 1984.[5]

The events that surrounded this merger agreement form the gravamen of Colteryahn's complaint. Colteryahn charges that the Western Pennsylvania Fund, its trustees, and various actuaries and accountants employed by the Fund, misrepresented the financial status of the Fund at the time of the merger, and thus fraudulently induced Colteryahn to accede to and approve the merger.[6] Moreover, Colteryahn charges the defendants with

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5 There is no explanation in the record for this surprisingly long period.

6 Although not explained in any detail in the complaint or in appellant's briefs, apparently Colteryahn, as a member of the Dairy Fund, had the power to veto the merger. Colteryahn claims that it would have withheld its approval had it known of the true financial condition of the Western Pennsylvania Fund.

a continuing series of misrepresentations, concealments and non-disclosures that induced Colteryahn to remain a contributing employer of the Fund until 1984 or 1985. Specifically, Colteryahn contends that during the merger negotiations, and up until an extensive examination of the Fund's financial reports in November, 1984, the Fund fraudulently failed to disclose the existence of large unfunded liabilities that predated its merger with the Dairy Fund.

During the course of a labor dispute extending from mid-1984 to mid-1985, Colteryahn withdrew from the Fund. In accordance with MPPAA, the Fund imposed upon Colteryahn a withdrawal liability assessment, which the Fund calculated to be $589,239. Colteryahn challenged the calculation of this assessment in an arbitration proceeding which was pending at the time of oral argument in this case, contesting, *inter alia*, the interest rate used by the Western Pennsylvania Fund in its actuarial calculations, and the inclusion of Colteryahn's contributions to the (predecessor) Dairy Fund in computing the Western Pennsylvania Fund's contribution history for purposes of the withdrawal liability allocation formula. However, Colteryahn has advanced two challenges to the assessment which it argues should be heard in federal court, rather than by an arbitrator.

First, in Counts 1, 3 and 4 of its complaint, Colteryahn pleads various fraud and misrepresentation claims, contending that the withdrawal liability assessment of $589,239 actually represents unfunded liabilities of the Fund that predated the merger and which were concealed from Colteryahn, and therefore that Colteryahn is not responsible for them. Count 1 is styled as an equitable claim under ERISA, seeking to prevent the Fund from benefitting from its wrongdoing, and Counts 3 and 4 request damages under ERISA from the various defendants. Second, in Count 2, Colteryahn seeks a declaratory judgment that payments made by Colteryahn to reduce the unfunded liabilities of the Dairy Fund at the time of the merger were not "contributions" under ERISA, and therefore were improperly included in assessing plaintiff's withdrawal liability. Colteryahn contends that neither the fraud counts nor the count disputing the contribution calculation states the type of claim

that Congress intended for an employer to submit to arbitration.

In addition, Colteryahn sets forth, in Counts 5 through 9, several state common law claims for breach of contract, misrepresentation, negligence and civil conspiracy.

The Fund moved to dismiss the complaint for lack of subject matter jurisdiction, asserting that Colteryahn must first submit its challenges to arbitration. The district court agreed, and dismissed the federal claims for failure to exhaust administrative remedies provided by MPPAA. The court then dismissed the state law counts for lack of pendent jurisdiction.[7] Colteryahn appeals from the dismissal of its complaint, and, as we have noted, the Fund cross-appeals, contending that the district court should have declared the state law claims preempted by ERISA rather than dismissing them, which has the effect of allowing Colteryahn to pursue them in state court.

III. COUNTS 1, 3 AND 4: THE CLAIMS OF FRAUDULENT INDUCEMENT

A. *Arbitrability*

The district court held that arbitration could provide a full and fair remedy for the claims that Colteryahn was fraudulently induced to join and remain in the Fund, and therefore that MPPAA requires Colteryahn first to submit these claims to arbitration. We disagree.

The Fund points to no evidence that a MPPAA arbitrator, schooled in the technical application of MPPAA's statutory requirements, has any expertise in resolving claims of fraud and misrepresentation. Moreover, even if an arbitrator possessed the expertise to decide Colteryahn's fraud claims, it is plain that the statute neither grants the MPPAA arbitrator such power nor, more importantly, deprives the federal courts of the power

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7 The motion to dismiss was made jointly by the Fund and its named trustees; however, for the sake of simplicity, this opinion will refer to these defendants collectively as "the Fund." The record does not show whether the other defendants joined in the motion; however, it is clear that the district court dismissed the entire complaint.

to decide such claims in the first instance. Section 1401 (a)(1), the only provision that might provide a basis for denying the federal courts jurisdiction that they otherwise could exercise, provides for arbitration of disputes "concerning a determination made under sections 1381 through 1399." 29 U.S.C. § 1401(a)(1). However, sections 1381 through 1399 are technical provisions, describing how and when withdrawal liability is to be assessed. For example, § 1384 explains when a sale of an employer's assets constitutes a withdrawal from a plan. Section 1385, 1386 and 1388 describe how to adjust an assessment for a partial withdrawal. Section 1389 provides for certain "de minimus" exceptions. Section 1391 sets forth the several accepted methods for calculating the assessment itself.[8]

These sections provide no basis for either adjusting or eliminating an assessment based on fraud or misrepresentation, and we have been cited to no legislative history or other authority even remotely suggesting any such basis. Moreover, not one of the statutory provisions even arguably implicated by Colteryahn's fraud claim falls within sections 1381-1399. *See infra* Parts III.B, III.C. Plainly, Colteryahn's dispute with the Fund does not concern any "determination made under" any of these provisions. Rather, Colteryahn's claim that it was fraudulently induced to become and remain a contributing member of the Western Pennsylvania Fund differs significantly from the types of highly technical MPPAA issues that the statute has assigned to arbitration. We therefore reject the district court's holding that it was without jurisdiction to hear that claim in its various forms.

B. *Jurisdiction*

The fact that MPPAA's arbitration requirement does not deprive the court of jurisdiction to hear the fraud and misrepresentation claims does not end the inquiry, for Colteryahn still must assert some affirmative basis for federal jurisdiction

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8 Other sections between 1381 and 1399 deal with employers who only contributed to a plan for a temporary period; suspensions of contributions during labor disputes; actuarial assumptions; and various exceptions. All of these are technical provisions.

and point to particular substantive provisions or rights that the Fund has allegedly violated.

Colteryahn relies on 29 U.S.C. § 1451, which creates federal jurisdiction over MPPAA disputes. The Fund, however, contends that Colteryahn's challenge is merely a thinly-disguised ERISA breach of fiduciary duty claim, and that Colteryahn, as an employer, cannot bring such a claim because only a participant, beneficiary, fiduciary, or the Secretary of Labor has standing to bring an ERISA breach of fiduciary duty suit. *See, e.g.*, 29 U.S.C. § 1132(a)(2) (1982) ("A civil action may be brought . . . by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief [for breach of fiduciary duty]"); *Northeast Dep't ILGWU Health & Welfare Fund* v. *Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 153 & n.3 (3d Cir. 1985) (holding that "§ 1132 must be read narrowly and literally," and implying, in dicta, that a non-fiduciary employer does not have standing to sue under § 1132); *Tuvia Convalescent Center* v. *Nat'l Union of Hosp. & Health Care Employees*, 717 F.2d 726, 729-30 (2d Cir. 1983) (employer has no standing under § 1132). The Fund's legal proposition is correct. However, we agree with Colteryahn that it has not attempted to assert a breach of fiduciary duty claim.

Fiduciary duties under ERISA, as a general rule, are owed to participants and beneficiaries only. *See, e.g., Alton Memorial Hosp.* v. *Metropolitan Life Ins. Co.*, 656 F.2d 245, 249 (7th Cir. 1981); *see generally* 29 U.S.C. §§ 1101-1114 ("Fiduciary Responsibility"). Colteryahn, however, has not alleged that the defendants acted contrary to the best interests of the participants or beneficiaries, in violation of such a duty. Rather, Colteryahn has alleged fraud and misrepresentation causing Colteryahn itself to suffer an injury that is separate and distinct from any possible injury to others. There is no claim that the Fund acted in breach of a statutory fiduciary duty to act in the best interests of Colteryahn, nor could there be one, because the Fund had no such duty. Thus we reject the Fund's attempt to characterize Colteryahn's suit as a breach of fiduciary duty suit under § 1132.[9]

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9 We find further support for this conclusion in the fact that the Fund's reading of Colteryahn's complaint would lead to an untoward result.

(footnote continued)

As we have noted, Colteryahn submits that we should look to § 1451 for the jurisdictional basis for this suit. We agree. Section 1451(a)(1) provides, in pertinent part:

> A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, . . . may bring an action for appropriate legal or equitable relief, or both.

29 U.S.C. § 1451 (1982). "[T]his subtitle" refers to Subtitle E of ERISA, 29 U.S.C. §§ 1381-1453, *i.e.*, MPPAA. The Fund's assessment of withdrawal liability, as well as its purported misrepresentations and concealments of the Fund's financial condition, plainly were "act[s] or omission[s] . . . under this subtitle with respect to a multiemployer plan." Thus, by the very terms of the statute, Colteryahn, as an employer, may bring an action for redress of these allegedly wrongful acts. Section 1451, however, merely provides jurisdiction over this claim; it does not define or create the claim itself. We therefore next must determine the substantive basis for such a claim.

Were we to conclude that this is essentially a breach of fiduciary duty suit, then we would also be constrained to conclude that Colteryahn, as an employer, has no standing to bring this action. We refuse to impute to Congress, without affirmative evidence in the legislative history, an intent to deny an aggrieved employer a federal forum to redress a fraud directed at itself and possibly no other.

The Fund correctly points out that the Secretary of Labor also has standing to bring suit under § 1132. *See* 29 U.S.C. § 1132(a)(2). However, we see no evidence in the legislative history to lend support to the Fund's assertion, made at oral argument, that Congress intended that the only option available to defrauded employers would be to file a complaint with the Labor Department. In fact, it is not clear that the Secretary can bring such a suit even upon the prompting of an aggrieved employer. *See* H.R. Cong. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5108 ("the Secretary of Labor is not to bring an action for equitable relief with respect to a violation of the participation, vesting and funding standards of title I unless he is requested to do so either by the Secretary of the Treasury or by one or more participants, beneficiaries, or fiduciaries of the plan"); 29 U.S.C. § 1132(b)(1).

C. *The Substantive Basis for the Claim*

Colteryahn advances two potential substantive bases for its claim. It points first to § 1411, which provides both substantive and procedural criteria that must be satisfied in order to consummate a valid merger of two multiemployer plans under MPPAA.[10] Second, it relies upon federal common law. It is our obligation first to explore a possible statutory basis for the claim. For the reasons noted in the margin, such a claim (under § 1411) may or may not be viable;[11] while Colteryahn is free to

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10 Section 1411(b) provides:

> A merger or transfer satisfies the requirements of this section if—
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> (1) in accordance with regulations of the corporation, the plan sponsor of a multiemployer plan notifies the corporation of a merger with or transfer of plan assets or liabilities to another multiemployer plan at least 120 days before the effective date of the merger or transfer;
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> (2) no participant's or beneficiary's accrued benefit will be lower immediately after the effective date of the merger or transfer than the benefit immediately before that date;
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> (3) the benefits of participants and beneficiaries are not reasonably expected to be subject to suspension under section 1426 of this title; and
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> (4) an actuarial valuation of the assets and liabilities of each of the affected plans has been performed during the plan year preceding the effective date of the merger or transfer, based upon the most recent data available as of the day before the start of that plan year, or other valuation of such assets and liabilities performed under such standards and procedures as the corporation may prescribe by regulation.

29 U.S.C. § 1411(b) (1982).

11 Colteryahn alleges that the Fund has failed to provide a true actuarial valuation of its assets and liabilities, in violation of § 1411(b)(4). *See also* 29 C.F.R. Part 2672 (notice requirements for mergers of multiemployer plans); *id.* § 2672.7(e) (detailing the information required in such notice).

The requirements of § 1411 were added to ERISA as a part of MPPAA in 1980, *see* Pub. L. No. 96-364, Title I, § 104(2), 94 Stat. 1244 (1980), four years after the merger agreement between the two plans was signed. Colteryahn, however, correctly points out that in its complaint it alleged that the merger was not actually consummated until "sometime between December 1975 and April 1984." Complaint ¶ 13, App. at R-5. *See supra* note 5. Because Colteryahn has not yet had an opportunity to prove these allegations, we must assume them to be true for purposes of this appeal. On

pursue this claim in the remanded proceeding, we do not rely upon it here. Rather, we rely upon the second ground.

It is by now well settled that federal courts are empowered to create a federal common law of pension plans under ERISA, in order to effectuate Congress' intent to preempt the area, *see infra* note 22, and create a comprehensive federal regulatory scheme. *See Murphy* v. *Heppenstall Co.*, 635 F.2d 233, 237 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982); *see also Northeast Dep't ILGWU Health & Welfare Fund* v. *Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 157-58 (3d Cir. 1985) (opinion of Becker, J.); *Barrowclough* v. *Kidder, Peabody & Co.*, 752 F.2d 923, 936-37 (3d Cir. 1985); *In re White*

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remand, Colteryahn may of course conduct discovery to determine when the merger of the two plans was consummated. If it was consummated on or after MPPAA's effective date of September 26, 1980, then MPPAA's merger requirements, § 1411, may apply.

Additionally, Colteryahn contends that we should apply the requirements of § 1411 retroactively, at least in this case where the fraud allegedly continued beyond the formal effective date of the provision. Colteryahn, however, points to nothing in the legislative history to indicate an intent to apply § 1411 retroactively, and we have grave doubts about retroactive application. Congress has legislated quite precisely and extensively in terms of the effective dates of various MPPAA, and other ERISA provisions, *see* 29 U.S.C.A. § 1461 (West Supp. 1988), yet has made no specific references to § 1411 beyond the general effective date of MPPAA. September 26, 1980, *see* § 1461(e).

If § 1411 is found not to apply, in order to bring a federal cause of action Colteryahn will need to point to some other substantive standard that it claims was violated. Moreover, even if applicable, § 1411 (and the merger regulations promulgated under § 1411, *see* 29 C.F.R. Part 2672 (1987); *id.* § 2672.7(e)) may not provide sufficient substantive requirements to encompass all of Colteryahn's allegations of fraud and misrepresentation. For example, it is not clear whether the statute and regulations cover continuing misrepresentations after the merger has already been consummated. Moreover, it is possible that the views of the Pension Benefit Guaranty Corporation, which promulgated and enforces MPPAA's merger regulations, could be relevant to a determination of any violation thereof. Finally, by their very terms, neither the statute nor the regulations mention fraud or misrepresentation; plainly some judicial gloss on these requirements would be needed to support Colteryahn's claims. We intimate no view on this question, however, because we find an alternative basis for Colteryahn's cause of action in federal common law.

Farm Equip. Co., 788 F.2d 1186, 1191 (6th Cir. 1986) (federal court must develop its own rule of decision in cases involving employee welfare plans "where ERISA itself furnishes no answer"); 29 U.S.C. § 1144(a) (1982).

It is axiomatic that, as a general rule, a party should not be allowed to profit from its own wrongs. We believe that this rule is particularly apposite when dealing with federally regulated pension plans, because "Congress has emphasized 'the equitable character' of [these] plans, 29 U.S.C. § 1001(c), [and therefore] we believe that equitable principles should be applied in this case." *Reuther* v. *Trustees of Trucking Employees Welfare Fund*, 575 F.2d 1074, 1078 (3d Cir. 1978).[12] Assuming the truth of Colteryahn's allegations, the substantial withdrawal liability assessed upon Colteryahn in this case stemmed in large part (if not entirely) from fraudulent misrepresentations by the Fund, for which the federal common law of pension plans would provide a remedy.[13] Indeed, we would find it quite curious if Congress had given multiemployer plans the immense power that the Fund has exercised in this case—*viz.*, the power to assess upon a withdrawing employer a substantial penalty while providing the employer with few defenses—yet did not intend to place some check on the conduct and practices of such plans. Moreover, we doubt that Congress intended that innocent employers, penalized by the fraudulent exercise of such powers, would be without remedy. Finally, given the predominant fed-

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12 Section 1001(c), cited in *Reuther*, states that it is the policy of ERISA, *inter alia*,

> to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. § 1001(c) (1982).

13 As we understand the complaint, Colteryahn alleges that it would not have approved the merger had it known of the substantial unfunded liabilities of the Fund and, moreover, that the withdrawal liability assessment (which is calculated by charging the withdrawing employer with its pro rata share of the plan's unfunded liabilities) consists primarily of the *pre-merger* undisclosed liabilities. *See, e.g.*, Complaint ¶¶ 16, 25, App. at R-6, R-8.

eral interest in the conduct of pension plans' affairs, any check on such power must be available in federal court.

The fraud alleged in this case presents a much more appropriate occasion for invocation of equitable principles than the cases that have permitted employers to gain restitution of improperly paid contributions when the fault for the improper payments lay solely with the contributing employer rather than with the plan. *See, e.g., Airco Indus. Gases* v. *Teamsters Health and Welfare Pension Fund*, 618 F. Supp. 943, 948, 951 (D. Del. 1985) ("Airco I") (although an employer has no standing to sue under § 1132(a), a cause of action for unjust enrichment to recover pension contributions mistakenly made to a plan will be permitted because such an action, "equitable in nature, and developed in light of the policies of ERISA, is appropriate and 'necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in the large by Congress' ") (quoting *Van Orman* v. *American Ins. Co.*, 680 F.2d 301, 312 (3d Cir. 1982)) (other citations omitted); *Whitworth Bros. Storage Co.* v. *Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221, 233-36 (6th Cir.) (recognizing an equitable claim for restitution of mistaken pension contributions under federal common law), *cert. denied*, 107 S. Ct. 645 (1986); *Airco Indus. Gases* v. *Teamsters Pension Trust Fund*, 668 F. Supp. 893, 900-901 (D. Del. 1987) (fleshing out the cause of action recognized in *Airco I*, and collecting cases that have recognized similar causes of action), *appeal docketed*, No. 87-3642 (3d Cir. Sept. 28, 1987); *contra Dime Coal Co.* v. *Combs*, 796 F.2d 394, 399 n.7 (11th Cir. 1986) ("Although the question is not well presented, . . . we hold that no federal common law right to recovery of the disputed [mistaken] contributions at issue in this case exists."); *McHugh* v. *Teamsters Pension Trust Fund*, 638 F. Supp. 1036, 1048-49 (E.D. Pa. 1986) (no cause of action for restitution of mistaken contributions); *Crown Cork & Seal Co.* v. *Teamsters Pension Fund*, 549 F. Supp. 307, 310-12 (E.D. Pa. 1982) (same), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983).

We have no occasion in this case to consider ruling on the issue of the viability of a claim based on the employer's mistake. In this case the issue is fraud.

In sum, we hold that, under the federal common law of pension plans, Colteryahn, as a defrauded employer, may sue in federal court for the return of any withdrawal liability sums that were assessed as a result of a fraudulent inducement to join the Fund. Colteryahn may thus proceed with Counts 1, 3 and 4 of its complaint.

IV. ARBITRABILITY OF COUNT 2 (PAYMENTS TO REDUCE THE DAIRY FUND'S LIABILITIES)

Count 2 of Colteryahn's complaint, as we understand it, seeks a determination whether certain payments made at the time of the merger should be counted as "contributions" for the purpose of apportioning the Fund's unfunded vested liabilities among its member employers. Section 1391 requires such apportionment to assess a withdrawal liability sum. The district court held that, under 29 U.S.C. § 1401, Colteryahn must first exhaust the administrative remedy of arbitration before proceeding on this claim to district court. We agree.

Section 1401(a)(1) states: "Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title *shall* be resolved through arbitration." 29 U.S.C. § 1401(a)(1) (emphasis added). In *Republic Industries* v. *Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290 (3d Cir. 1982), we explained that

> Congress, in enacting MPPAA, expressed a clear preference for self-regulation through arbitration, 29 U.S.C. § 1401(a)(1); . . . Thus, in accordance with the exhaustion doctrine's policy of deference to Congress, the legislature's decision that arbitration, and not the courts, is the proper forum for the initial resolution of disputes should be respected.

Id. at 294-95.[14]

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14 We also noted in *Republic Industries* certain exceptions to the exhaustion requirement, not relevant here, and held that

> because Republic mounts a facial challenge to the constitutionality of MPPAA and because arbitration could neither moot the constitutional

Colteryahn contends, however, that this is a pure legal issue, the resolution of which requires only the interpretation of a statute, and no factual development. Moreover, Colteryahn claims that, at this early stage in the litigation, the Fund has not yet identified any disputed issues of material fact. Without such a factual dispute, Colteryahn contends, arbitration is unnecessary. Colteryahn's contentions, however, are entirely undercut by our recent decision in *Flying Tiger Line* v. *Teamsters Pension Trust Fund*, 830 F.2d 1241 (3d Cir. 1987).[15]

In *Flying Tiger* we noted that § 1401 "does not differentiate between legal and factual questions; it simply dictates that '*[a]ny dispute* between an employer and the plan sponsor . . . shall be resolved through arbitration.' 29 U.S.C. § 1401 (1982)." 830 F.2d at 1255 (emphasis and ellipsis supplied by *Flying Tiger* court). We therefore held that " 'it should be beyond cavil that the existence of an issue of statutory interpretation, standing alone, does not justify bypassing arbitration.' " *Id.* (quoting *I.A.M. Nat'l Pension Fund, Plan A, A Benefits* v. *Clinton Engines Corp.*, 825 F.2d 415, 418 (D.C. Cir. 1987));[16] *see also Teamsters Pension Trust Fund—*

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issues presented by resolving this matter on nonconstitutional grounds nor develop a factual matrix for the later resolution of the issues by the judiciary, arbitration does not provide an adequate administrative remedy for Republic's claims, and it would be futile to compel exhaustion.

693 F.2d at 297 (footnote omitted).

15 The decision in *Flying Tiger* was filed subsequent to the briefing in the instant case. At our request, the parties submitted supplemental letter memoranda on the effect of *Flying Tiger*.

16 The court in *Flying Tiger* quoted approvingly an unpublished opinion of the District Court for the District of Columbia:

> Congress has devised an elaborate statutory scheme for resolving disputes that may arise over the determinations and amounts of withdrawal liability. To permit an employer to stylize his [or her] claim into a "question of law" and thereby bypass this framework would surely frustrate the intent of Congress and should not be sanctioned by the courts.

830 F.2d at 1255 (quoting *Combs* v. *Pelbro Fuel, Inc.*, No. 83-1524, *mem. op.* at 14 (D. D.C. Nov. 15. 1984)) (bracketed material supplied by *Flying Tiger* court).

Bd. of Trustees of W. Conference v. *Allyn Transp. Co.*, 832 F.2d 502, 504 (9th Cir. 1987) ("questions of statutory interpretation are not excepted from arbitration under MPPAA") (footnote omitted). Thus, where the issue of statutory interpretation "involves only a MPPAA section that Congress explicitly reserved for arbitration," arbitration is the appropriate route for resolution of the dispute. *Flying Tiger*, 830 F.2d at 1254.

As noted above, Colteryahn seeks a determination whether payments made to reduce the unfunded liabilities of the Dairy Fund at the time of the merger constitute "contributions" within the meaning of § 1391 for the purpose of calculating Colteryahn's withdrawal liability. We believe that such a question constitutes the type of calculation issue for which MPPAA arbitration is most appropriately designed, because it is directly related to the actual determination of the size of the assessment. Unlike the fraudulent inducement claims, which concern events external to the actual calculation of the assessments (*e.g.*, representations made by the Fund to Colteryahn and the extent of Colteryahn's reliance on these representations), Count 2 challenges the calculation itself, contending that the wrong inputs were plugged into the equation when doing the actual computation. In sum, Colteryahn's challenge "concern[s] a determination made under sections 1381 through 1399" and therefore, by the very terms of the statutory mandate, "shall be resolved through arbitration." 29 U.S.C. § 1401(a)(1).[17]

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17 We find Colteryahn's reliance on our decision in *Dorn's Transportation* v. *Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986), to be misplaced. In *Dorn's* we reached the merits of a MPPAA dispute without first requiring resort to arbitration, and held that, because "there was no need for the development of a factual record, we do not believe the district court abused its discretion in denying discovery and bypassing arbitration." *Id.* at 903. *Dorn's*, however, did not purport to set forth a black letter rule; it merely found no abuse of discretion in the district court's decision to reach the merits. *See id.* In the instant case, however, the district court elected to dismiss the complaint in favor of arbitration, rather than reach the merits. We cannot quarrel with this decision, because we view the mandate of § 1401 as unequivocal.

(*footnote continued*)

We therefore will affirm the district court's holding that Colteryahn must first submit Count 2 to arbitration. However we will reverse the court's order insofar as it dismissed Count 2 outright. The logical course would have been to stay proceedings on Count 2 until arbitration is completed, *see, e.g., Flying Tiger*, 830 F.2d at 1256, and we will so order.

V. THE CROSS-APPEAL: PREEMPTION

After dismissing each of Colteryahn's federal claims, the district court held that it could not assert pendent jurisdiction over plaintiff's state law counts and therefore dismissed them as well. In its cross-appeal, the Fund urges us to hold that the district court should have asserted jurisdiction over these claims and then dismissed them as failing to state a cause of action

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Moreover, *Flying Tiger* appears to have limited *Dorn's* to its particular facts. *See, e.g., Flying Tiger*, 830 F.2d at 1253 n.19. *Dorn's* itself recognized that it would be a "rare case" where there would be "no need" for factual development, 787 F.2d at 903 (emphasis added), and *Flying Tiger* makes clear that "any doubt concerning fact/law differentiation as a means of determining whether arbitration is appropriate should be resolved in favor of arbitration." 830 F.2d at 1255.

It is interesting to note, in this regard, that the law of MPPAA arbitration has evolved in this circuit along a similar course to that taken in the D.C. Circuit. In *IAM National Pension Fund* v. *Stockton Industries*, 727 F.2d 1204 (D.C. Cir. 1984), relied on by this court in *Dorn's*, a panel of the D.C. Circuit appeared to hold that a pure question of statutory interpretation need not first be submitted to MPPAA arbitration. *See Dorn's*, 787 F.2d at 903; *IAM*, 727 F.2d at 1209-10. However, three years later, in *Grand Union Co.* v. *Food Employers Labor Relations Association*, 808 F.2d 66 (D.C. Cir. 1987), another panel of the D.C. Circuit plainly limited *IAM* to the unique facts of that case (where the pension fund had "effectively waived the right to [demand arbitration]," 808 F.2d at 70), and held that MPPAA's arbitration-first rule applies even to pure statutory questions. *See id.* at 69-71.

At all events, we are not as confident as Colteryahn that this case would not benefit from *some* factual development. For example, it might be useful to learn trade custom as to the meaning of "contributions", as well as the intent and understandings of the parties at the time these disputed payments were made. A clear expression of intent conceivably might obviate the need for a general statutory exegesis.

because they are preempted by ERISA. *See* 29 U.S.C. § 1144(a) (1982), ERISA's express preemption provision.[18]

Colteryahn counters that its state law claims allege acts of misrepresentation and breach of contract that occurred prior to the merger of the two plans, hence prior to Colteryahn's joining the Western Pennsylvania Fund. Thus, Colteryahn contends, although its suit may affect the Fund, it does not "relate" to the Fund as required by § 1144(a) in order to be preempted, because it concerns obligations of the defendant (arising out of tort and contract duties) independent of any duties under ERISA.

Since we have held that Colteryahn has a cause of action under the federal common law of ERISA for fraud and misrepresentation, and since the allegations made in Colteryahn's federal counts are substantially similar to the allegations made in Colteryahn's state law claims, we express serious doubt whether, consistent with the broad preemptive nature of ERISA, we could allow Colteryahn to proceed with its parallel state law claims.[19] *See* 29 U.S.C. § 1144(a) ("the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan").

The district court has not yet ruled on this question, however, and we prefer, as a matter of prudence, to allow the district

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18 Section 1144(a) provides, in pertinent part:

> Except as provided in subsection (b) [not pertinent here], the provisions of this subchapter [relating to "protection of employee benefit rights"] and subchapter III of this chapter [relating to "plan termination insurance," and including MPPAA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA].

29 U.S.C. § 1144(a).

19 *See generally Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) ("The pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements.") (citation omitted); *Shaw* v. *Delta Air Lines*, 463 U.S. 85, 99 (1983) (" 'the substantive and enforcement provisions of [ERISA] are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans' ") (footnote omitted) (quoting 120 Cong. Rec. 29,933 (1974) (statement of Sen. Williams)).

court to address this issue in the first instance.[20] We note that the district court will now have the benefit of our ruling that Colteryahn has stated a federal cause of action for fraud and misrepresentation. Moreover, the district court is in a better position than we are to glean the precise nature of the state law counts in order both to compare them to the federal claims and to determine whether they "relate" to an employee benefit plan. Finally, given that our disposition of the other issues requires a remand and substantial further proceedings in the district court, we do not believe that this further remand will constitute an inefficient use of judicial resources. In any event, the district court will have to reconsider its decision to deny pendent jurisdiction, given our holding that the court has subject matter jurisdiction over Colteryahn's fraud and misrepresentation claims.

VI. CONCLUSION

For the foregoing reasons we will reverse the order of the district court. The case will be remanded with instructions to exercise federal subject matter jurisdiction over Counts 1, 3 and 4, to stay proceedings on Count 2 until arbitration is completed, and to determine whether Counts 5 through 9 are preempted by ERISA.

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20 Because of the posture in which we remand this case—directing the district court to exercise jurisdiction over Colteryahn's fraudulent inducement claims—we need not decide an interesting and difficult question presented by the Fund's cross-appeal, *viz.*, whether the district court would have had jurisdiction to declare the state law claims preempted even in the absence of any anchoring federal claim. *Cf. Metropolitan Life Ins. Co.* v. *Taylor*, 107 S. Ct. 1542 (1987) (federal court has jurisdiction over state law claims that are preempted by ERISA but fall within the scope of § 1132); *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) (federal court does not have jurisdiction over state law claims that are preempted by ERISA but for which ERISA does not provide an alternative cause of action).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3262 & 87-3295

CARL COLTERYAHN DAIRY, INC.,

Appellant/Cross Appellee

v.

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND, AMERICAN BENEFIT CORPORATION, MELVIN M. BROOKS, C.P.A., FRANK STOKES, individually and as agent of AMERICAN BENEFIT CORPORATION, LEON B. WILNEFF, individually and as agent of AMERICAN BENEFIT CORPORATION, THOMAS L. FAGAN, W.F. HARDY, JAMES H. HUTCHINSON, JR., SAMUEL A. MONTANI, CHARLES E. SALVATORE, JOSEPH E. ZAUCHA, RICHARD R. PELUSO, RAYMOND H. BAKER, individually and as Trustees of the WESTERN PENNSYLVANIA TEAMSTERS EMPLOYERS PENSION FUND,

Appellees

The Western Pennsylvania Teamsters and Employers Pension Fund and its individually named Trustees, Thomas L. Fagan, W. F. Hardy, James H. Hutchinson, Jr., Samuel A. Montani, Charles E. Salvatore, Joseph E. Zaucha, Richard R. Peluso, and Raymond H. Baker,

Appellees/Cross Appellants

(D.C. Civil No. 86-2428)

SUR PETITION FOR PANEL REHEARING AND REHEARING IN BANC

PRESENT:

GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*.

The petition for rehearing filed by intervenor Pension Benefit Guaranty Corporation in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

Judge Seitz does not desire rehearing on the assumption that the decision does not imply that the recognized actions can form a basis for interference with the statutory scheme for recovering withdrawal liability.

BY THE COURT,

/s/ EDWARD R. BECKER
Circuit Judge

DATED: July 25, 1988

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 86-2428

CARL COLTERYAHN DAIRY, INC.,

Plaintiff,

vs.

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND; AMERICAN BENEFIT CORPORATION; MELVIN M. BROOKS, C.P.A; FRANK STOKES, individually and as agent for AMERICAN BENEFIT CORPORATION; THOMAS L. FAGAN; W.F. HARDY; JAMES H. HUTCHINSON, JR.; SAMUEL A. MONTANI; CHARLES E. SALVATORE; JOSEPH E. ZAUCHA; RICHARD L. PELUSO; and RAYMOND H. BAKER, individually and as Trustees of the WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND,

Defendants.

ORDER OF COURT

AND NOW, this 11th day of March, 1987,

IT IS ORDERED that defendant's motion to dismiss be and hereby is granted and the complaint and motion for injunctive relief of Carl Colteryahn Dairy, Inc., be and hereby is dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1). It is fur-

ther ordered that defendant's motion for attorney's fees and costs be and hereby is denied.

/s/ DONALD E. ZIEGLER
Donald E. Ziegler
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 86-2428

CARL COLTERYAHN DAIRY, INC.,

Plaintiff,

vs.

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND; AMERICAN BENEFIT CORPORATION; MELVIN M. BROOKS, C.P.A; FRANK STOKES, individually and as agent for AMERICAN BENEFIT CORPORATION; THOMAS L. FAGAN; W.F. HARDY; JAMES H. HUTCHINSON, JR.; SAMUEL A. MONTANI; CHARLES E. SALVATORE; JOSEPH E. ZAUCHA; RICHARD L. PELUSO; and RAYMOND H. BAKER, individually and as Trustees of the WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND,

Defendants.

MEMORANDUM OPINION

ZIEGLER, District Judge

Plaintiff, a dairy from Pittsburgh, Pennsylvania seeks damages and injunctive relief for alleged misrepresentation and inequitable assessments of withdrawal liability under ERISA, MEPPA, and common law. Defendants seek dismissal of plaintiff's action, arguing that the plaintiff's claims are barred under ERISA for failure to exhaust mandatory arbitration procedures. We hold that dismissal of plaintiff's federal claims is appropriate because arbitration is required under ERISA. We further decline to exercise pendent jurisdiction over plaintiff's state claims.

I. *History of Case*

According to evidence of record, plaintiff withdrew from its status as employer-contributor with the defendant, Western Pennsylvania Teamsters and Employers Pension Fund during the course of a labor dispute extending from May 1984 to mid-August 1985. On March 14, 1985, pursuant to 29 U.S.C. § 1399(b)(1), the fund formally demanded payment of withdrawal liability, assessed at $589,239.00, from Colteryahn. The total assessment of $589,239.00 was broken down into 59 interim monthly payments. As of December 15, 1986, Colteryahn timely made 18 regular payments totalling $222,633.00.

Meanwhile, Colteryahn contested the assessment and, on December 10, 1985, filed for arbitration pursuant to its rights under 29 U.S.C. § 1401. Thereafter, Colteryahn filed the instant complaint, alleging that the fund and other defendants committed various acts of misrepresentation, fraudulent concealment, negligence and breach of contract, which justify a total or partial reduction of its assessed withdrawal liability. Colteryahn seeks three forms of relief: an injunction prohibiting defendants from collecting, pursuing, or further making an assessment of withdrawal liability; and/or a judgment against the fund for the total assessed withdrawal liability; and/or declaratory judgment that Colteryahn owes no withdrawal liability or a reduction in the assessed liability to $301,527.00. Colteryahn further argues that, given the tortious and wrongful conduct of the fund and other defendants, its cause of action is outside of the mandatory arbitration procedure of 29 U.S.C. § 1401 and is properly before this court. Colteryahn also filed a motion for injunctive relief, seeking an order of court authorizing subsequent payment of remaining withdrawal liability assessments into an escrow account rather than to the fund.

The fund has filed a motion to dismiss Colteryahn's complaint and accompanying request for injunctive relief on several grounds. Defendant fund argues that each claim advanced by Colteryahn in its complaint is grounded upon the assertion that Colteryahn's withdrawal liability was improperly calculated. The fund also contends that such challenges are covered by section 1401 which commits these issues to arbitration for resolu-

tion. The fund further argues that the claims for relief, including fraudulent concealment, misrepresentation, negligence, breach of contract and conspiracy, are preempted by 29 U.S.C. § 1144 and that Colteryahn lacks standing under 29 U.S.C. § 1132(a) to raise claims of alleged violations of ERISA.

II. *Discussion*

MEPPA mandates that disputes concerning withdrawal liability must be resolved through arbitration. Congress has provided that "any dispute between an employer and the plan sponsor of a multiemployer plan concerning a . . . [determination of withdrawal liability] shall be resolved through arbitration." 29 U.S.C. § 1401(a)(1).

We are reminded of the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy is exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). The Court of Appeals for the Third Circuit in *Republic Industries v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290, 294-95 (3d Cir. 1982), determined that arbitration of withdrawal liability disputes under ERISA is entirely consistent with the exhaustion doctrine. Therefore, arbitration is compelled in such cases unless arbitration would neither provide an adequate remedy for the litigant nor further the goal of judicial economy. *Id.* at 296.

Challenges to withdrawal liability inevitably give rise to a host of issues which cannot be answered by reference to or interpretation of specific provisions of ERISA. Many such issues exist only because withdrawal liability has been assessed. To conclude that such issues cannot be addressed in arbitration, but only in a separate judicial proceeding running parallel to arbitration, seems clearly at odds with Congressional intent.

Although Colteryahn has advanced a variety of claims, they are reducible to one fundamental assertion: that Colteryahn's withdrawal liability was improperly calculated or should be reduced due to the alleged malfeasance or misfeasance of the fund and other defendants. We find further that Colteryahn

has failed to demonstrate that arbitration would not result in an adequate remedy, and has not shown that arbitration cannot provide full relief.

Because we find that 29 U.S.C. § 1401(a)(1) plainly commits the instant dispute concerning proper assessment of withdrawal liability to arbitration and because federal law favors the doctrine of exhaustion of administrative procedures, we dismiss counts I through V and VII through IX of Colteryahn's complaint. In count VI of its complaint, Colteryahn alleges state claims of breach of contract against the American Benefit Corporation ("ABC"), a West Virginia Corporation, two individual actuaries, citizens of West Virginia, sued individually and as agents of ABC, and an individual certified public accountant, a Pennsylvania citizen. No independent basis of federal jurisdiction exists for these claims and in the absence of a federal claim, we exercise our discretion under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), to dismiss plaintiff's pendent state claims. Furthermore, claims embodied in Colteryahn's Motion for Leave to Make Payments of Alleged Withdrawal Liability Into Escrow are based on allegations of Colteryahn's complaint and are directly related to the disputed issue of withdrawal liability. They too must be referred to arbitration.

In all actions under 29 U.S.C. § 1132, except those brought to enforce Section 1145 of ERISA, the district court in its discretion may award attorney's fees and costs to the prevailing party in an action by a fiduciary against the employer. 29 U.S.C. § 1132(g)(1). The fund's reference to *Grand Union Company v. Food Employers Labor Relations Association*, 808 F.2d 66 (1987), is not dispositive in the instant case. We do not find that Colteryahn's action or the nature of the claims alleged demonstrates bad faith or vexatious conduct, the primary aim of which was to circumvent surreptitiously the statutory dispute resolution procedure under ERISA. Furthermore, in light of the already substantial monthly payments being made by Colteryahn, and its timely remittance of such payments in the past, an award of attorney's fees and costs in the instant case is inappropriate.

III. *Summary*

Because plaintiff failed to exhaust mandatory arbitration proceedings under ERISA for resolving claims alleged in the instant action, plaintiff's complaint and its request for injunctive relief will be dismissed. Furthermore, plaintiff's pendent state claims, which lack an independent federal jurisdictional basis, will be dismissed. Defendant's motion for attorney's fees and costs will be denied. A written order will follow.

Dated: Mar. 11, 1987

/s/ DONALD E. ZIEGLER
Donald E. Ziegler
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 86-2428

CARL COLTERYAHN DAIRY, INC.,

Plaintiff,

v.

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND, et al.,

Defendants.

ORDER OF COURT

AND NOW, this 18th day of March 1987,

IT IS ORDERED that plaintiff's motion for reconsideration under Fed. R. Civ.P. 59(e) be and hereby is denied.

/s/ DONALD E. ZIEGLER
Donald E. Ziegler
United States District Judge

cc: Richard B. Sandow, Esq.
Henry M. Wick, Esq.
American Benefit Corporation
Frank Stokes, F.S.A.
Leon B. Wilneff
Melvin M. Brooks, C.P.A.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 86-2428

CARL COLTERYAHN DAIRY, INC.,

Plaintiff,

v.

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND, et al.,

Defendants.

MEMORANDUM OPINION

ZIEGLER, District Judge

(1) Plaintiff employer, a former member of defendant pension fund, seeks injunctive, declaratory and compensatory relief for alleged fraudulent misrepresentations and subsequent liability for plaintiff's withdrawal from the pension fund. Jurisdiction is based under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132, and the Multi-Employer Pension Plan Act, 29 U.S.C. § 1451.

(2) Defendants moved to dismiss, arguing plaintiff's failure to exhaust administrative remedies. Defendants noted that ERISA and MEPPA require arbitration where an employer disputes withdrawal liability calculations of the fund.

(3) On March 11, 1987, we granted the motion, holding that plaintiff made no showing that the remedy of arbitration could not provide full and fair relief. Plaintiff since has filed a motion for reconsideration under Fed. R. Civ. P. 59(e), asserting that its complaint, read in a light most favorable to the nonmoving party, states common law causes of action for fraud, breach of contract, negligence and civil conspiracy in addition to several

claims for violations of federal pension law. Plaintiff further argues that, although the relief affects its withdrawal liability, the complaint raised issues not appropriate for arbitration.

(4) MEPPA requires that "any dispute between an employer and the plan sponsor of a multiemployer plan concerning a . . . (determination of withdrawal liability) shall be resolved through arbitration." 29 U.S.C. § 1401. Plaintiff interprets section 1401 to limit an arbitrator's review to calculations of withdrawal liability. In plaintiff's view, an arbitrator is not equipped to consider its defenses of fraud, misrepresentation and breach of contract. According to plaintiff, the complaint raises questions of statutory interpretation more properly brought before the district court under the general jurisdiction provision of MEPPA, 29 U.S.C. § 1451(a)(1).

(5) Defendants rejoin that, at bottom, plaintiff seeks relief from an assessed $589,239 liability for withdrawal from the pension fund. At paragraph 1 of the complaint, plaintiff makes three demands, each of which attempts to avoid withdrawal liability: "The instant action seeks (1) an injunction prohibiting defendants from collecting, pursuing or further making an assessment of $589,239 in withdrawal liability against plaintiff and/or (2) a judgment against defendants in the amount of $589,239 and/or (3) a declaratory judgment that plaintiff owes no withdrawal liability and/or reducing the maximum potential withdrawal liability to $301,527." Defendants argue that plaintiff has crafted a creative complaint to avoid ERISA's policy favoring arbitration.

(6) This court encountered a similar issue in *Casablanca Industries, Inc.* v. *Huber*, No. 85-1667 (W.D. Pa. October 9, 1985), where an employer sought injunctive relief requiring defendant fund to comply with ERISA in calculating withdrawal liability. We noted that the statute and caselaw did not limit an arbitrator's role to that of factfinder alone, but rather permitted the arbitrator to apply factual findings to statutory law. 29 U.S.C. § 1401(a)(3)(A); *I.A.M. National Pension Fund Benefit Plan C* v. *Stockton Tri Industries*, 727 F.2d 1204, 1207 n.7 (D.C. Cir. 1984). Accordingly, we reaffirm our holding that

an arbitrator can consider the ERISA claims raised in counts one through four in determining plaintiff's withdrawal liability.

(7) According to plaintiff, counts six through nine assert "pendent state claims against the various Defendants for breach of contract (Articles of Merger), misrepresentation, negligence (in the preparation of accounting reports) and civil conspiracy." Brief in Opposition to Motion to Dismiss, at p. 3. Because these claims do not arise under federal law and because the parties are not diverse, no independent basis for federal jurisdiction attaches. We continue to believe that dismissal of these claims is appropriate under the doctrine of *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966). As plaintiff has pointed out, these claims are not related to a calculation of withdrawal liability under ERISA or MEPPA. We believe pendent jurisdiction should not be exercised because facts needed to show misrepresentation, breach of contract and civil conspiracy are independent of those facts related to liability under ERISA or MEPPA.

A written order will follow.

DATED: Mar. 18, 1987

/s/ DONALD E. ZIEGLER
Donald E. Ziegler
United States District Judge

APPENDIX E

SELECTED PROVISIONS OF THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 ("MPPAA"), *CODIFIED AT* 29 U.S.C. §§ 1381-1453

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section—

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted—

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

* * * *

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 25, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of—

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of—

(A) such unamortized amount; multiplied by—

(B) a fraction—

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers—

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of—

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d)

of this section. A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be determined in a manner different from that provided in subsection (b) of this section.

(2)(A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of—

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before September 26, 1980, and

(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before September 26, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after September 25, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of—

(i) an amount equal to—

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after September 25, 1980; multiplied by

(ii) a fraction—

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws, and

(II) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part during those plan years.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of—

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction—

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4)(A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of—

(i) the plan's unfunded vested benefits which are attributable to participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with

regulations of the corporation) decreased by the share of plan assets determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying—

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction—

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan as of the end of the plan year.

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to service with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding the plan year in which the employer withdraws and all preceding plan years; and

(II) the denominator of which is the sum of all contributions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction—

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which such employer withdraws, is equal to—

(i) an amount equal to—

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to—

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5)(A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this section, subject to

the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method shall provide for the allocation of substantially all of a plan's unfunded vested benefits among employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) of this section shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of Title 26, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c) of this section.

(2) Sections 1384, 1389, 1399(c)(1)(B), and 1405 of this title shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer

In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

(f) Computations applicable in case of withdrawal following merger of multiemployer plans

In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) of this section shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

* * * *

§ 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the

plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

* * * *

§ 1411. Mergers and transfers between multiemployer plans

(a) Authority of plan sponsor

Unless otherwise provided in regulations prescribed by the corporation, a plan sponsor may not cause a multiemployer plan to merge with one or more multiemployer plans, or engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such merger or transfer satisfies the requirements of subsection (b) of this section.

(b) Criteria

A merger or transfer satisfies the requirements of this section if—

(1) in accordance with regulations of the corporation, the plan sponsor of a multiemployer plan notifies the corporation of a merger with or transfer of plan assets or liabilities to another multiemployer plan at least 120 days before the effective date of the merger or transfer;

(2) no participant's or beneficiary's accrued benefit will be lower immediately after the effective date of the merger or transfer than the benefit immediately before that date;

(3) the benefits of participants and beneficiaries are not reasonably expected to be subject to suspension under section 1426 of this title; and

(4) an actuarial valuation of the assets and liabilities of each of the affected plans has been performed during the plan year preceding the effective date of the merger or transfer, based upon the most recent data available as of the day before the start of that plan year, or other valuation of such assets and liabilities performed under such standards and procedures as the corporation may prescribe by regulation.

(c) Actions not deemed violation of section 1106(a) or (b)(2) of this title

The merger of multiemployer plans or the transfer of assets or liabilities between multiemployer plans, shall be deemed not to constitute a violation of the provisions of section 1106(a) or (b)(2) of this title if the corporation determines that the merger or transfer otherwise satisfies the requirements of this section.

(d) Nature of plan to which liabilities are transferred

A plan to which liabilities are transferred under this section is a successor plan for purposes of section 1322a(b)(2)(B) of this title.

* * * *

§ 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

Supreme Court, U.S.
FILED
DEC 28 1988
JOSEPH F. SPANIOL, CLERK

No. 88-731

In The

Supreme Court of the United States

October Term, 1988

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND; THOMAS L. FAGAN; W. F. HARDY (Deceased); JAMES H. HUTCHINSON, JR.; SAMUEL A. MONTANI (Deceased); CHARLES E. SALVATORE; JOSEPH E. ZAUCHA; RICHARD R. PELUSO; AND RAYMOND H. BAKER,

Petitioners,

v.

CARL COLTERYAHN DAIRY, INC.; PENSON BENEFIT GUARANTY CORPORATION; AMERICAN BENEFIT CORPORATION; MELVIN M. BROOKS, C.P.A.; FRANK STOKES, Individually and as Agent of AMERICAN BENEFIT CORPORATION, and LEON B. WILNEFF, Individually and as Agent of AMERICAN BENEFIT CORPORATION,

Respondents.

BRIEF OF CARL COLTERYAHN DAIRY, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD B. SANDOW, ESQUIRE

JONES, GREGG, CREEHAN & GERACE
16th Floor - Grant Building
Pittsburgh, PA 15219
(412) 261-6400

Attorneys for Respondents
Cari Colteryahn Dairy, Inc., et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER QUESTION PRESENTED

Whether, under the federal common law of pension plans, a defrauded employer may sue in Federal Court for damages arising out of a fraudulent inducement to join a Pension Fund?

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RULE

Supreme Court Rule 17 4

COUNTER-STATEMENT OF THE CASE

At issue is whether the Third Circuit's decision to permit a defrauded Employer a cause of action for damages in Federal Court, which has not been shown to be in conflict with any other Federal Circuit Court or United States Supreme Court decision, should be reviewed by this Court.

A. History of the Case

Respondent, Carl Colteryahn Dairy, Inc., ("Employer") was a member of the Greater Pittsburgh Industry Dairy Fund ("Dairy Fund") prior to 1976. After extensive negotiations, the Dairy Fund and Western Pennsylvania Fund Trustees executed Articles of Merger in December, 1976, which ultimately resulted in a consummation of the merger some time prior to April, 1984.

In 1984, Colteryahn Dairy withdrew as a contributing employer to the Western Pennsylvania Teamsters and Employers Pension Fund ("Western Pennsylvania Fund"), whereupon the Fund imposed a withdrawal liability assessment of $589,239.00 under the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. §§ 1381-1453 (1982). Challenging the assessment of the Western Pennsylvania Fund, Colteryahn Dairy filed an action pursuant to 29 U.S.C. § 1401 which provides for arbitration of the calculation of withdrawal liability. This matter is still in litigation.

On November 14, 1987, Colteryahn Dairy filed a Complaint against the Western Pennsylvania Fund, various Trustees ("Trustees") and various actuaries and auditors ("Accountants") associated with the Fund, in the United States District Court for the Western District of

Pennsylvania. The Complaint alleged that the defendants had fraudulently induced Colteryahn Dairy to accede to a merger of the Fund through a series of misrepresentations and concealments in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1982). The Complaint further alleged the Fund had improperly calculated the assessment due to an erroneous interpretation of 29 U.S.C. § 1391 which provides the methods for computing withdrawal liability. Finally, the Complaint alleged defendants had also breached certain State common law contract and tort duties.

Defendant/Petitioner Western Pennsylvania Fund's Motion to Dismiss plaintiff's Complaint was granted on March 12, 1987. Judge Ziegler, U. S. District Court for the Western District of Pennsylvania, dismissed the Complaint on the basis that the matter was subject to ERISA arbitration proceedings, and therefore federal jurisdiction was unavailable. Judge Ziegler also *sua sponte* dismissed the claims against the other defendants. All pendent jurisdiction claims were dismissed as well. Colteryahn Dairy filed a Motion for Reconsideration which Judge Ziegler denied on March 18, 1987.

B. The Decision Below

The Third Circuit reversed the District Court's dismissal of the fraud, misrepresentation and concealment counts holding that these counts are not the type of technical calculations which Congress intended for MPPAA arbitration. The Circuit Court further held that subject matter jurisdiction was conferred upon the District Court pursuant to U.S.C. § 1451, and directed the

District Court to determine jurisdiction over the pendant State causes of action in accordance with the Third Circuit Opinion. In addition, the Circuit Court approved the District Court's Order directing that Count II (concerning whether certain payments were contributions) await arbitration, but modified the District Court's dismissal of this Count. Instead, the Third Circuit ordered a stay of proceedings on Count II until arbitration was completed.

The essence of the Third Circuit's decision that Employer's fraud claims are not covered by the arbitration provisions of ERISA are contained in the Circuit Court's analysis of the statutory framework of ERISA:

> These sections provide no basis for either adjusting or eliminating an assessment based on fraud or misrepresentation, and we have been cited to no legislative history or other authority even remotely suggesting any such basis. Moreover, not one of the statutory provisions even arguably implicated by Colteryahn's fraud claim falls within sections 1381-1399. *See infra* Parts III.B, III.C. Plainly, Colteryahn's dispute with the Fund does not concern any "determination made under" any of these provisions. Rather, Colteryahn's claim that it was fraudulently induced to become and remain a contributing member of the Western Pennsylvania Fund differs significantly from the types of highly technical MPPAA issues that the statute has assigned to arbitration. We therefore reject the district court's holding that it was without jurisdiction to hear that claim in its various forms. *See* Appendix at 10a.

The Third Circuit's decision that federal jurisdiction exists to hear the Employer's fraud claims is based on the broad jurisdictional provisions of 29 U.S.C.A. § 1451(a)(1) and basic legal principles incorporated into ERISA:

It is axiomatic that, as a general rule, a party should not be allowed to profit from its own wrongs. *See* Appendix at 15a.

The Pension Benefit Guaranty Corporation ("PBGC") filed a Petition for Rehearing and a Suggestion for Rehearing *En Banc* which was denied on July 25, 1988.

The Western Pennsylvania Fund and its Trustees have filed a Petition for Writ of Certiorari in the case at bar seeking to have this Honorable Court review the Third Circuit's ruling.

REASONS FOR DENYING THE PETITION

PETITIONERS FAIL TO MEET ANY OF THE CRITERIA FOR OBTAINING CERTIORARI

Rule 17 of the Supreme Court Rules enumerates several considerations which may serve as reasons for granting certiorari, such as a Federal Court of Appeals decision conflicting with decisions of other circuits, or a Federal Court of Appeals decision departing from the accepted and usual course of judicial proceedings. Petitioners have not cited any Court of Appeals decision which conflicts with the Third Circuit opinion in this case. To the contrary, as cited in the Third Circuit Opinion, analogous cases from the Third and other Circuits are consistent with the decision in the instant case. *See* Appendix at 14a, 15a, 16a and cases cited therein.

Instead, petitioners choose to rely on Rule 17.1(c) by labeling their case as "an important question of federal

law which has not been, but should be, settled by this Court." Although the area of pension law poses many important questions of federal law, the facts and circumstances of the case at bar clearly demonstrate that the appropriate procedures for litigating this action were unquestionably followed by the Third Circuit Court of Appeals when it permitted the Respondent, a defrauded employer, to sue in Federal Court for damages from a multi-employer fund and its agents.

Petitioners' argument characterizing this issue as ripe for Supreme Court review is threefold. Respondent will address each argument independently.

1. The Third Circuit Decision Does Not Contradict Statutory Remedies

Contrary to the assertions in Petitioner's Petition, the case at bar does not present an issue of the creation of a private right of action in federal court. The jurisdictional section, 29 U.S.C. § 1451 (a)(1) already creates broad jurisdiction and provides that an "employer . . . who is adversely affected by the act or omission of any party under this subtitle with respect to a multi-employer plan . . . may bring an action for appropriate legal or equitable relief or both . . . "

This broad grant of jurisdiction contains no language excluding acts or omissions due to a Fund's misrepresentations which induced an employer to join the Fund via a merger of plans. To the contrary, the legislative history and public policy of ERISA and MPPAA indicate that these statutes must be read broadly to afford appropriate federal relief. *See Massachusetts Mutual Life Insurance v. Russell*, 473 U.S. 134, 156 (1985). ("The legislative history

demonstrates that Congress intended federal courts to develop federal common law in fashioning relief under ERISA." D. Brennan, J., concurring.); *Murphy v. Heppenstall Co.*, 635 F.2d 233, 237 (3rd Cir. 1980) *cert. den* 454 U.S. 1142 (1982); *See also* Third Circuit Opinion at Appendix 15a; 29 U.S.C. § 1401 (a), (emphasizing the equitable character and soundness of plans) and 29 U.S.C. § 1001 (C)(3) (declaring as a policy the encouragement of the "maintenance and growth of multi-employer pension plans.") Respondent respectfully submits that these policies cannot be fostered by permitting Pension Funds and Fund representatives to commit fraudulent actions without being subject to suit in court. To the contrary, changing the axiom cited by the Third Circuit that "a party should not be allowed to profit from its own wrongs" would discourage employer participation in multi-employer funds, encourage employer withdrawal at any economically feasible time, and seriously imperil the maintenance and growth of multi-employer pension plans.

Rather than creating federal jurisdiction, the federal common law principles adopted by the Third Circuit are an interpretation of 29 U.S.C. § 1451 and the remedies created. As the Third Circuit states:

> Indeed, we would find it quite curious if Congress had given multi-employer plans the immense power to assess upon a withdrawing employer a substantial penalty while providing the employer with few defenses – yet did not intend to place some check on the conduct and practices of such plans. Moreover, we doubt that Congress intended that innocent employers, penalized by the fraudulent exercise of such powers, would be without remedy. Finally, given the predominant federal interest in the conduct

of pension plans' affairs, any check on such power must be available in federal court. *See* Appendix at 15a-16a.

None of the cases cited in the Petition concern claims of fraudulent activity as described in the case at bar. None of these cases concern a broad underlying jurisdictional grant to employers to bring suit for any appropriate legal or equitable relief. Nor has any Circuit or Supreme Court precedent contrary to the Third Circuit decision been cited. To the contrary, as noted by the Third Circuit, although some dispute exists among the Circuits concerning the right of employer to restitution for mistaken payments, no such dispute is presented when confronted with fraudulent activity. *See* Appendix at 16a.

This Court has consistently permitted the development of federal common law to effectuate the civil enforcement schemes of ERISA. In both *Massachusetts Mutual v. Russell, supra,* and *Pilot Life Ins. Co. v. Dedeaux,* 107 S. Ct. 1549 (1987), this Honorable Court acknowledged the expectation "that a federal common law of rights and obligations under ERISA-regulated plans would develop." *Pilot Life, supra,* at 1558; *See also Massachusetts Mutual, supra,* at 156. In the case at bar, the civil enforcement scheme of 29 U.S.C.A. § 1451 can be effectuated only by the adoption of the limited federal common law principles espoused by the Third Circuit.

2. The Third Circuit Decision Effectuates Congressional Purposes

The Petitioners suggest that, by enacting 29 U.S.C.A. § 1451, Congress intended that innocent employers, penalized by the fraudulent exercise of Pension Fund powers, would be without remedy. Petitioners provide no

legislative history to support their contention that Congress intended a revolutionary reversal of the general rule preventing a party from not profiting from its own wrong. The language of 29 U.S.C.A. § 1451, which adds to ERISA the right of an Employer to sue and provides for federal jurisdiction for appropriate legal *or* equitable relief, appears to be a broadening, not limiting provision. Certainly if Congress intended to insulate pension funds from any liability for fraudulent activities, it could have used more expressive language.

The congressional purpose of maintenance and growth of multi-employer plans is promoted, not contradicted, by a federal common law right to redress fraud. The continued existence and growth of multi-employer plans is dependent on existing employers continuing their participation and new employers joining such plans. A holding that employers have no redress for fraudulent inducement committed by a Pension Fund would discourage this participation.

There is nothing in the legislative history to suggest that Congress intended for innocent employers who are defrauded by pension funds to be without judicial redress. In *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72 (1982), this Honorable Court similarly held that employers could raise the illegality of the underlying pension contribution contract despite the absence of an express provision in ERISA providing such a defense. In *Kaiser*, this Honorable Court was "unpersuaded that Congress intended to give pension fund trustees the benefit of illegal bargaining that were not, and should not have been, relied upon to ensure the solvency of the trust funds." *Kaiser, supra*, at 99 n. 13. The same analysis should apply to the case at bar.

The "flood of litigation" argument advanced by petitioners is a mirage. The Third Circuit decision creates a very narrow federal common law right for employers who are defrauded by pension funds and their representatives. There is no basis to believe that the Circuits will permit a flood of vague and ill-defined claims to be asserted.

3. The Administrative Remedy (Arbitration) Is Inadequate in the Instant Case

Administrative procedures are not to be blindly required as prerequisites to suit in all cases. Rather, as this Court has frequently acknowledged, "The doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue." *Weinberger v. Salfi*, 422 U.S. 749, 763 (1975). "The policies underlying the exhaustion requirement" associated with the specific statutory administrative procedure must be examined to determine whether the administrative remedy need be exhausted. *Bowen v. City of New York*, 106 S. Ct. 2022, 2032 (1986).

Respondent respectfully submits that the Third Circuit's analysis of MPPAA's administrative scheme is correct and this administrative scheme provides an inadequate remedy which was never intended to encompass claims of fraudulent inducement by defrauded employers.

MPPAA's arbitration provisions do not grant a MPPAA arbitrator the power to assess damages against a Fund and its agents for fraud, the relief requested by Respondent Colteryahn Dairy's Complaint. An examination of 29 U.S.C.A. §§ 1381-1399 and 29 U.S.C.A. § 1451(a)(1) indicates that MPPAA arbitration is limited

to the technical determination of the assessment of withdrawal liability. As the Third Circuit stated, "These sections provide no basis for either adjusting or eliminating an assessment based on fraud or misrepresentation." *See* Appendix at 10a. Further, "Colteryahn's claim that it was fraudulently induced to become and remain a contributing member of the Western Pennsylvania Fund differs significantly from the types of highly-technical MPPAA issues that the statute has assigned to arbitration." Appendix at 10a.

As a practical matter, the standards presented in the statutory sections and Pension Benefit Guaranty Corporation guidelines provide no guidance to the arbitrator to assist him in deciding issues of fraudulent inducement. Rather, the standards concern technical calculation issues and MPPAA arbitrators are elected for their expertise in this limited highly-technical area.

Petitioners improperly confuse the case at bar with a challenge to a withdrawal liability assessment. Respondent Colteryahn Dairy's Complaint does not challenge the assessment, but rather claims that other parties may be liable in damage for injuries caused to Respondent. If Respondent is successful, it will not eliminate or reduce Respondent Colteryahn Dairy's withdrawal liability nor alter Colteryahn Dairy's requirement to pay this liability.[1]

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[1] In fact, Colteryahn Dairy has independently challenged the calculation of the assessment through the arbitration process and has made the interim payments required by MPPAA's arbitration procedures.

Rather, Respondent will be entitled to a judgment against the parties responsible for fraudulent and related activities which caused injury.

Since the administrative scheme is inadequate to provide the relief sought and the statutory guidelines for MPPAA arbitrators indicate Congress never intended such arbitrations to include issues of fraudulent inducement, the doctrine of exhaustion of administrative remedies is inapplicable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD B. SANDOW, Esquire
JONES, GREGG, CREEHAN & GERACE
16th Floor – Grant Building
Pittsburgh, PA 15219
(412) 261-6400

Attorney for Respondent
Carl Colteryahn Dairy, Inc.

Dated: December 28, 1988

No. 88-731

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND; THOMAS L. FAGAN; W.F. HARDY (Deceased); JAMES H. HUTCHINSON, JR.; SAMUEL A. MONTANI (Deceased); CHARLES E. SALVATORE; JOSEPH E. ZAUCHA; RICHARD R. PELUSO; AND RAYMOND H. BAKER,

Petitioners,

—v.—

CARL COLTERYAHN DAIRY, INC.; PENSION BENEFIT GUARANTY CORPORATION; AMERICAN BENEFIT CORPORATION; MELVIN M. BROOKS, C.P.A.; FRANK STOKES, Individually and as Agent of AMERICAN BENEFIT CORPORATION; and LEON B. WILNEFF, Individually and as Agent of AMERICAN BENEFIT CORPORATION,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

Henry M. Wick, Jr.
Charles J. Streiff
Vincent P. Szeligo
WICK, STREIFF, MEYER, METZ & O'BOYLE
1450 Two Chatham Center
Pittsburgh, PA 15219
(412) 765-1600

James B. Weidner
(Counsel of Record)
Stanley Godofsky
R. Scott Henderson
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000
Attorneys for Petitioners Western Pennsylvania Teamsters and Employers Pension Fund, et al.

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Respondent's opposition confirms that certiorari should be granted.

1. Respondent misconstrues the Fund's petition as urging a position that would leave allegedly defrauded employers "without remedy." Opp. 7. Congress provided the remedy in MPPAA. Fund Pet. 7. The issue raised by this petition is whether the court below acted properly in creating a new federal common law remedy to fit the circumstances of *this* case because of its concern that these circumstances may not fit the

remedy Congress has statutorily provided.[1] As Respondent agrees, the court's decision in this respect was based solely upon the court's view of equitable principles. Opp. 6, 7. Having thus exceeded what Congress enacted, the court below violated what this Court has made clear: "[E]quitable considerations" are plainly "*not* a sufficient reason for enlarging on the remedial provisions contained in carefully considered statutes." *Northwest Airlines*, 451 U.S. at 98 (footnote omitted; emphasis supplied).

2. Respondent refers to the development of a "federal common law" of pension plans. Opp. 6-7. The reference is unavailing. The Court has directed that the judiciary is not to use notions of federal common law to "alter or supplement the remedies enacted," even in statutes Congress expected the courts to shape through decisions. *Texas Indus.*, 451 U.S. at 645. That admonition is particularly apt in this case, where recognition of remedies beyond those specifically provided in MPPAA would upset the "balancing of policies embodied in its choice of remedies." *Pilot Life Ins. Co.*, 107 S. Ct. at 1557. And, indeed, except for the decision below, *no* court has invoked federal common law to engraft new remedies onto those expressly enacted as part of MPPAA in 1980, nor does MPPAA's legislative history evidence a congressional intent that courts could do so. *See* Fund Pet. 8, 10.

3. Respondent contends the rationale of the decision below is "very narrow." Opp. 9. The opposite is true. As enacted, section 1451 limits claims to those arising from an "act or omission . . . *under this subtitle* [*i.e.*, MPPAA]." (52a). The decision below nevertheless signals that courts are free to fashion whatever federal common law claims they find appropriate in cases involving MPPAA, even in the face of the statutory remedy and procedure covering the same subject matter. Absent review, the decision will remain an open invitation for employer lawsuits seeking to override the express provisions of

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1 Whether or not the Employer would succeed under the statute in this particular case turns on legal and factual issues not involved on this petition. *See* 13a-14a & n.11.

MPPAA, thereby renewing the uncertainty that Congress through MPPAA sought to avoid for pension plans and thousands of their beneficiaries throughout the country.

A writ of certiorari should issue to review the decision of the Court of Appeals.

Dated: January 13, 1989

Respectfully submitted,

James B. Weidner
(Counsel of Record)
Stanley Godofsky
R. Scott Henderson
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000

Attorneys for Petitioners Western Pennsylvania Teamsters and Employers Pension Fund, et al.

Of Counsel:

Henry M. Wick, Jr.
Charles J. Streiff
Vincent P. Szeligo
WICK, STREIFF, MEYER, METZ & O'BOYLE
Two Chatham Center
Pittsburgh, PA 15219
(412) 765-1600